

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Telenet of South Florida, Inc. for relief under Section 252(i) of the Telecommunications Act of 1996 with respect to rates, terms and conditions for interconnection and related arrangement with BellSouth Telecommunications, Inc.

DOCKET NO. 970730-TP
ORDER NO. PSC-97-0989-PCO-TP
ISSUED: August 20, 1997

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

BACKGROUND

On November 12, 1996, pursuant to Section 364.161(1), Florida Statutes, Telenet of South Florida, Inc., (Telenet) filed a petition in Docket No. 961346-TP for arbitration of its dispute with BellSouth Telecommunications, Inc., (BellSouth) concerning the provisioning of call forwarding. BellSouth charged that Telenet was using call forwarding in violation of Section A13.9.1.A.1 of BellSouth's General Subscriber Service Tariff (GSST). Telenet alleged that the tariff provision was an anticompetitive restriction. On April 23, 1997, we issued Order No. PSC-97-0462-FOF-TP, in which we ruled that BellSouth may sell its call forwarding services to Telenet subject to Section A13.9.1.A.1. By Order No. PSC-97-0861-FOF-TP, issued July 17, 1997, we denied Telenet's motions for reconsideration and stay of Order No. PSC-97-0462-FOF-TP.

DOCUMENT NUMBER-DATE

08402 AUG 20 97

FPSC-RECORDS/REPORTING

On June 17, 1997, Telenet filed a Petition for Relief Under 47 U.S.C. §252(i), and this docket was opened to address Telenet's new petition. Telenet alleges that BellSouth has refused to extend to Telenet BellSouth's interconnection agreement with AT&T Communications of the Southern States, Inc., (AT&T agreement) under the same terms and conditions.

On July 3, 1997, Telenet filed an Emergency Motion for Stay and a Request for Oral Argument on Emergency Motion for Stay, again seeking stay of Order No. PSC-97-0462-FOF-TP. BellSouth filed a response in opposition on July 10, 1997. On July 24, 1997, Telenet filed a Notice of Administrative Appeal with the Supreme Court of Florida (Telenet of South Florida, Inc. v. Johnson, Case No. 91,045). On the same date, Telenet filed with the Court an Emergency Motion for Stay of our Orders Nos. PSC-97-0462-FOF-TP and PSC-97-0861-FOF-TP and a Motion to Shorten Time to Respond to Appellant's Emergency Motion for Stay. On that date, the Court granted Telenet's motion for stay pending response on or before August 4, 1997, and further consideration. On August 4, 1997, BellSouth and our Division of Appeals separately filed responses with the Court. As of this date, the Court has not acted further. Accordingly, we have deferred our decisions concerning Telenet's Emergency Motion for Stay and Request for Oral Argument pending the Court's action.

On July 8, 1997, BellSouth filed a Motion to Dismiss the Petition for Relief Under 47 U.S.C. §252(i) of Telenet of South Florida, Inc. Telenet filed a response in opposition on July 22, 1997. Upon consideration, we find it appropriate to deny BellSouth's motion for the reasons we set forth below.

MOTION TO DISMISS

Telenet states in its Petition for Relief Under 47 U.S.C. §252(i) that it seeks an interconnection agreement with BellSouth upon the same terms and conditions of BellSouth's interconnection agreement with AT&T.¹ Telenet alleges that BellSouth, however,

¹In Re: Petition by AT&T Communications of the Southern States, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Concerning Interconnection and Resale Under the Telecommunications Act of 1996. Docket No. 960833-TP. We issued

requires an interconnection agreement with Telenet to contain the restrictions of Section A13.9.1.A.1.² This, Telenet contends, is discriminatory and in violation of 47 U.S.C. §252(i). Telenet requests that we require BellSouth to make available its interconnection agreement with AT&T in pertinent part upon the same terms and conditions.

In order to sustain a motion to dismiss, the moving party must show that the petition fails to state a cause of action for which we may grant the relief requested. All allegations in the petition should be taken as though true, and considered in the light most favorable to the petitioner. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

On March 31, 1997, pursuant to Section 364.161(1), Florida Statutes, Telenet formally requested BellSouth "to unbundle its network features, functions, and capabilities, as well as access to signaling databases, systems and routing processes, including but not limited to those relating to Call Forwarding services, and offer them to Telenet." On April 5, 1997, BellSouth apparently proposed its interconnection agreement with AT&T as the basis for negotiation with Telenet. When Telenet expressed interest in that agreement, BellSouth, on May 14, 1997, presented a draft agreement tailoring the AT&T agreement to those provisions it considered applicable to Telenet. The draft agreement contained language that

our Final Order on Arbitration, Order No. PSC-96-1579-FOF-TP, on December 31, 1996. By Order No. PSC-97-0724-FOF-TP, issued June 19, 1997, and amended by Order No. PSC-97-0724A-FOF-TP, issued June 26, 1997, we approved the interconnection agreement between BellSouth and AT&T.

²Section A13.9.1.A.1 of BellSouth's GSST provides that:

Call forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment in whole or in part of message toll charges that would regularly be applicable between the station originating the call and the station to which the call is transferred.

would require resold services to be used in the manner specified in BellSouth's tariffs. Telenet complains that this is not a use restriction incumbent upon AT&T, is therefore discriminatory, and subjects Telenet to GSST Section A13.9.1.A.1. Telenet alleges that the inclusion of this language violates both 47 U.S.C. §252(i) and our finding at page 60 in Order No. PSC-96-1579-FOF-TP, that "no restrictions on the resale of services shall be allowed, except for restrictions applicable to the resale of grandfathered services, residential services, and Lifeline/Linkup services to endusers who are eligible to purchase such service directly from BellSouth."

In its motion to dismiss, BellSouth asserts that we resolved the present matter in Order No. PSC-97-0462-FOF-TP, in which we found that BellSouth may sell call forwarding services to Telenet subject to Section A13.9.1.A.1 of its GSST. BellSouth observes that we determined that, while Telenet may have a different local calling area than BellSouth, Telenet, nonetheless, was required to pay applicable access charges pursuant to Section 364.16(3)(a), Florida Statutes.³

According to BellSouth, Telenet contends that under the AT&T agreement Telenet would be permitted to offer its customers call forwarding services in the very manner we found unlawful in Docket No. 961346-TP; that is, to carry calls across exchange boundaries in violation of Section 364.16(3)(a), Florida Statutes. BellSouth asserts that in the first place this contention fails, because Telenet cannot escape the effect of our orders regarding its use of call forwarding by entering into a previously approved interconnection and resale agreement, especially one that does not contemplate the service in question here. Secondly, BellSouth observes that the AT&T agreement requires BellSouth and AT&T to implement the agreement in a way comporting with applicable law;

³Section 364.16(3)(a), Florida Statutes, provides that:

No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

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thus, Telenet would be prevented from using call forwarding services in the way it wishes under the AT&T agreement.

In its opposition to BellSouth's motion to dismiss, Telenet maintains that under Section 252(i) it has an "absolute right" to take the AT&T agreement on the same terms and conditions. It alleges that BellSouth, however, has offered a version of the AT&T agreement that contains a number of material differences. Telenet points again to our ruling in Order No. PSC-96-1579-FOF-TP at pages 57 and 60 that rejected BellSouth's claim that any use or user restrictions in its relevant tariffs should apply to the resale of retail services. Telenet requests that we deny BellSouth's motion to dismiss for these reasons.

Telenet's petition was appropriately filed with this Commission pursuant to Rule 25-22.036, Florida Administrative Code. The relief Telenet seeks is our determination that under Section 252(i) it is permitted to take the AT&T agreement on the same terms and conditions. Section 252(i) provides that:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

In its petition, Telenet makes the prima facie case that, under Section 252(i), it has requested that BellSouth make available to Telenet the AT&T agreement on the same terms and conditions, and that BellSouth has offered a version of that agreement that contains different terms and conditions. This issue differs from the one we arbitrated in favor of BellSouth in Docket No. 961346-TP; to wit, whether BellSouth could sell its call forwarding services to Telenet subject to a tariff restriction. For these reasons, and applying the aforementioned standard, we find that Telenet states a cause of action for which we may grant a remedy. Accordingly, we deny BellSouth's motion to dismiss.

We note that BellSouth may file an answer to Telenet's petition within 10 days of the issuance of this Order, pursuant to Rule 25-22.037(2)(a), Florida Administrative Code.


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Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that the motion of BellSouth Telecommunications, Inc., to dismiss the Petition for Relief Under 47 U.S.C. 252(i) of Telenet of South Florida, Inc., is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission, this 20th day of August, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.